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Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

CITY OF KANSAS CITY, MISSOURI,

Petitioner,

v.

JILL HARMON and JOHN KEAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in light of *Monell v. Department of Social Services* and its progeny a municipality may be held liable for damages under 42 U.S.C. § 1983 to a private citizen for the attempted enforcement of a constitutional ordinance by a non-municipal employee.

2. Whether the Eighth Circuit improperly narrowed the *Younger v. Harris* abstention doctrine.

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STATEMENT OF JURISDICTION

The Eighth Circuit entered its order and judgment on October 20, 1999. The Eighth Circuit denied the City's petition for rehearing and rehearing en banc on November 24, 1999. (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES, CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the right of free speech."

City of Kansas City, Missouri City Code § 50-2 provides:

> No person shall sell, solicit or offer for sale or hawk or peddle any article, thing or personal service, except newspapers and magazines, in or upon any street, sidewalk, alley, public way, public building, public park or place in the city; provided that nothing contained in this section shall be construed to prohibit the sale of articles from traveling florists or grocers; hucksters, as defined in § 40-108; food or beverage wagons, including any street vendor of food regulated by the Health Department as a food vendor selling food in or upon any street, sidewalk, alley, public way, building or place not controlled by the Board of Parks and Recreation Commissioners; or vendors of milk and dairy products and hot tamales; or producers of farm products as defined in RSMo 71.630; or businesses which are wholly located on private property but which sell articles to persons on the public sidewalk; provided, further, this section shall not be deemed to apply to the sale of any personal property at any established place in any public building, public park or public place by express authority of the government agency in control thereof. City of Kansas City, Missouri City Code § 50-2 passed 1967, amended 1983 and 1986.

STATEMENT OF THE CASE

This case involves a 42 U.S.C. § 1983, First Amendment claim brought against Petitioner City of Kansas City, Missouri (the "City" or "petitioner") by respondents Jill Harmon and John Kean ("Harmon and Kean" or "respondents") claiming that Kansas City, Missouri, Code of Ordinances § 50-2 ("§ 50-2" or "ordinance") was unconstitutional and sought an order enjoining its enforcement because the ordinance violated their First Amendment right to free speech. Respondents also sought money damages. The District Court of the Western District of Missouri, Western Division was the Court of first instance and it had jurisdiction pursuant to 28 U.S.C. § 1331.

Harmon had been cited for violating the ordinance, which prohibits sales of certain items on sidewalks. Harmon believed and the District Court ultimately found that her activities had not in fact violated the ordinance because she did not sell her items, but rather gave items away while seeking donations. Rather than asserting this factual defense in Municipal Court, Harmon and her partner Kean filed suit in Federal District Court challenging the constitutionality of the ordinance. The District Court held the ordinance to be unconstitutional on its face and as applied by the Police Officer that ticketed Harmon. The City appealed this decision and ultimately, Harmon and Kean were awarded $139,000 in damages and attorneys fees, although the Eighth Circuit did not affirm the decision of the District Court that the ordinance was unconstitutional.

The following facts are taken from the Eight Circuit opinion. (App. A). Since 1996, Harmon and Kean, also known as the "Butterflies," have actively sought to spread

their beliefs regarding personal, social, and political issues on the public sidewalks in Kansas City. Their message, in part, has been delivered by the distribution of "symbolic expressions" regarding the homeless and the hungry, including anklets, bracelets, and wood products. In addition, they distribute pamphlets with pictures to address topics such as equality, hunger, prevention of and recovery from abuse, healing, spiritual injuries, and love. None of these items contain words. Although Respondents do not sell these items, they do request a donation for them. The money raised from donations is used to create more pamphlets and jewelry and to purchase food for the hungry.

On July 19, 1996, Harmon and Kean had spread out their blankets and trinkets on the corner of 11th and Main Street in Kansas City, when two Police Department officers approached them. The officers told Respondents to leave the area or they would be arrested. In the midst of this encounter, a woman in the crowd approached Harmon and inquired as to the price of a bracelet. Harmon requested a seven-dollar donation. At that point, an officer informed Harmon that she had violated § 50-2 of the Kansas City Code by attempting to sell an item on a city sidewalk and issued her a citation.

On April 7, 1997, Respondents filed a pro se action in District Court against the City seeking damages and declaratory and injunctive relief on the basis that § 50-2 is facially unconstitutional and unconstitutional as applied under the First and Fourteenth Amendments. On May 13, 1997, the City filed a motion to dismiss or to stay the proceedings in the federal case. The City first asserted that *Younger* abstention was proper because a case was pending against Harmon in Municipal Court for an alleged violation of § 50-2 in which Harmon had filed a motion challenging

the constitutionality of the ordinance. Secondly, the City argued that Kean lacked standing to challenge the constitutionality of the ordinance because he had neither been arrested nor charged with violating § 50-2.

The District Court applied *Younger* abstention as to Harmon and therefore, dismissed her from the federal suit without prejudice. As to Kean, the court refused to abstain from the case and further, found that he possessed standing to challenge the ordinance despite the fact that he had not been arrested or given a citation. (*See also* App. D, p. 49a-51a). The parties filed cross motions for summary judgment. The District Court proceeded to hold that § 50-2 was unconstitutional as applied to Kean and on its face and therefore, granted summary judgment in his favor, and enjoined enforcement of the ordinance. (*See also* App. C, p. 18a-48a). Subsequent to this ruling, the City dismissed its Municipal Court case against Harmon. On May 26, 1998, the District Court granted Harmon's motion for reconsideration and reinstated her claim, extending the scope of the April 2, 1998, summary judgment order to Harmon based on its belief that both Respondents engaged in the same activity at the same time. (*See also* App. B, p. 16a-17a). The District Court found that Harmon's conduct did not violate the ordinance.

On June 11, 1998, the District Court held a bench trial to determine damages for Harmon and Kean, resulting in an award of $25,000 to Harmon and $10,000 to Kean. The court later awarded a total of $73,576.25 in attorney's fees. Moreover, the District Court permanently enjoined the City from enforcing § 50-2.

The City timely appealed the District Court's decision as to the monetary and injunctive relief, and attorney's fees to the Court of Appeals for the Eighth Circuit.

On October 20, 1999, the validity of the ordinance was upheld by the Eighth Circuit, which ruled that the ordinance did not prohibit Harmon and Kean's activities that are protected under the First Amendment. (App. A, p. 12a). The Eighth Circuit vacated the District Court's order declaring the ordinance unconstitutional and enjoining its enforcement. (App. A, p. 13a). The Eighth Circuit agreed with the District Court's finding that the City and the Police Department are separate legal entities. (App. A, p. 10a n.6). However, the Eighth Circuit held that despite the fact that the City and Police Department are separate legal entities, the City has to pay money damages to Harmon and Kean for the actions of a Police Department employee who cited Harmon in this action for a violation of § 50-2. (App. A, p. 14a). It is this portion of the Eighth Circuit decision that allowed the award of damages and attorney's fees (including the Eighth Circuit's award of another $30,000 in attorney's fees for appellate work) to stand that the City seeks relief from.

REASONS FOR GRANTING THE WRIT

I.

A MUNICIPALITY IS NOT LIABLE UNDER 42 U.S.C. "SECTION" 1983 TO A PRIVATE CITIZEN FOR THE ATTEMPTED ENFORCEMENT OF A CONSTITUTIONAL ORDINANCE BY A NON-MUNICIPAL EMPLOYEE.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

"A civil rights plaintiff cannot pursue a § 1983 action against a municipality or officials under a respondeat-superior theory." *Monell v. New York City Dep't. of Soc. Services*, 436 U.S. 658, 690 (1978). "Only when the employee is acting pursuant to an official policy or custom of the City can the City be held liable under § 1983." *Id.*

A survey of recent Circuit Court decisions reveals that no other Circuit has extended municipal liability under similar circumstances as the Eighth Circuit did in this case: *Fletcher v. Town of Clinton*, __ F.3d __, 1999 WL 997806, P. 11-12 (1st Cir. 1999) (for liability the action must implement or execute a policy statement, ordinance,

regulation, or decision officially adopted and promulgated by [the municipality's] officers or is pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision making channels); *Morris v. Lindau*, __ F.3d __, 1999 WL 961738 (2nd Cir. 1999) (a municipality can be held liable only if the alleged unconstitutional action implements an official "policy or custom [of the municipality], whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy); *Carter v. City of Philadelphia*, 181 F.3d 356-357 (3rd Cir. 1999) (there can be no county liability here because under Virginia law Fairfax County has no control over the internal administration of the Adult Department of Correction); *Grayson v. Peed*, __ F.3d __, 1999 WL 1004425, page 5 (4th Cir. 1999) (no control over employee, no liability); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 470-71 (5th Cir. 1999) (act of a policy maker or employee following policy maker's lead imposes liability); *DePiero v. City of Macedonia*, 180 F.3d 770, 785 (6th Cir. 1999) (no municipal liability for acts of employees or agents); *Kujawski v. Board of Commissioners of Bartholomew County, Ind.*, 183 F.3d 734, 737 (7th Cir. 1999) ("Our case law establishes that a plaintiff may demonstrate the existence of municipal policy or custom in one of three ways: proof of an express policy causing the loss, a widespread practice constituting custom or usage that caused the loss, or causation of the loss by a person with final policymaking authority."); *Christie v. Iopa*, 176 F.3d 1231, 1236 (9th Cir, 1999) (no policy maker involvement, no municipal liability); and *Jantzen v. Hawkins*, 188 F.3d 1247, 1259 (10th Cir. 1999) ("municipality cannot be held liable under § 1983 for acts of a *municipal official* (emphasis added) . . . unless that official possesses final policymaking authority to establish municipal policy with respect to the acts in question").

The City's ordinance which is at issue in this action, § 50-2, was originally passed in 1967 and amended in 1983 and 1986. Harmon and Kean began their activities in 1996. The decision to issue a citation Harmon for violation of § 50-2 was made by Kansas City, Missouri Police Department officers. The District Court found that § 50-2 did not prohibit Harmon and Kean's protected activities because they do not propose a "commercial transaction." (App. C, p. 32a). Therefore the Police Officer was mistaken when he wrote the citation for violation of § 50-2. It is clear from the record that § 50-2 was not enacted in 1967 with the Respondents in mind. For the Eighth Circuit to hold that § 50-2 somehow enabled the Police officers to harass Harmon, or Kean just does not follow.

Under United States Supreme Court precedent, a party may only be liable under § 1983 for damages if it proximately caused the claimed deprivation. In this case, the Eighth Circuit reviewed the record and agreed with the City that the Police Department was the sole source of the specific tactics used against Harmon and Kean. The Eighth Circuit also agreed that the City and the Police Department are separate legal entities. The Eighth Circuit vacated the declaratory and injunctive relief awarded, but then affirmed both the damages and attorney's fee awards entered by the District Court based on the finding that the City should be liable for the actions of the Police Department employees based on, "the mere attempt to enforce § 50-2 (the ordinance)." (App. A, p. 10a n.6). Under *Monell*, the Board of Police Commissioners, which is the governmental body responsible for the police department under Missouri law, could not be held liable for the actions of an individual officer in mistakenly citing someone, unless there was found to be a lack of training by the police department. RSMo 84.350

and 84.240; *Hasenmeyer v. Board of Police Commissioners of Kansas City*, 606 S.W.2d 468 (Mo. App. 1980); *Williams v. City of Kansas City*, 841 S.W.2d 193, 195 n.2 (Mo. App. 1992); *City of Canton v. Harris*, 489 U.S. 378, 387-92 (1989) (if a valid policy is unconstitutionally applied by a municipal employee, the municipality can be liable under § 1983 only if its failure to train the employee amounts to deliberate indifference to the constitutional rights of its inhabitants). Any lack of training was not an issue in the present case, nor could it be because the City is not the officer's employer, the Police Department is his employer. Therefore, although the Police Department could not be held liable for the actions of its officers without a showing of deliberate indifference, the City, whose only action was to pass § 50-2, the constitutional validity of which was not reached by the Eighth Circuit, was held liable because a police officer cited Harmon because he mistakenly believed that she had violated the ordinance. This result clearly conflicts with decisions in the United States Supreme Court which hold that a municipality cannot be held vicariously liable for its employees actions. So even if the City had employed the police officer, it would not be liable. No other Circuit has extended liability on the basis that if a municipality enacts an ordinance that is constitutionally valid, the municipality may be held liable for its mistaken enforcement by a non-municipal employee. If the City is to be held liable every time an officer, employee or not, mistakenly cites someone for violation of a constitutionally valid ordinance, then the doors to federal court would open as flood gates. "The constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted–indeed, for every suspect released." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). "[N]o one has a constitutional right to be free from a law officer's honest

misunderstanding of law or facts in making an arrest." *Gabbard v. Rose*, 359 F.2d 182, 185 (6th Cir. 1966).

The Eighth Circuit found that the City should be liable for damages based on the police officer's mistaken interpretation of this ordinance and attributed that interpretation to the City:

> § 50-2 *has been* applied to Kean and Harmon. No amount of linguistic argument, however correct, can erase this fact. Harmon was formally cited for violating the ordinance; Kean was threatened with sanction by officers who advanced § 50-2 as their justification. If the City were to absolve itself of liability for prior wrongs simply by recanting an interpretation of a statute it had wrongly applied, it would create a serious gap in the protection intended by federal civil rights actions. (App. A, p. 12a).

In this case, the City did not interpret or apply the ordinance, a Police Department police officer did. Since the City and Police Department are separate legal entities, and because the City could not be liable under respondeat superior even if the officer was its employee, the City should not have been held liable for the officer's mistaken interpretation and application of § 50-2. *Monell* at 694.

II.

THE EIGHTH CIRCUIT IMPROPERLY NARROWED THE *YOUNGER* ABSTENTION DOCTRINE.

The Eighth Circuit incorrectly narrowed the *Younger* abstention doctrine because both Kean's and Harmon's claims should have been dismissed by the District Court as Harmon was being prosecuted in Municipal Court, which is a division of the state court of Missouri, and Kean's interests were intertwined with Harmon's. The City's motion to abstain made at the District Court level was based on the *Younger* abstention doctrine because there was a case pending in the Municipal Court resulting from the citation issued to Harmon and her motion made in the Municipal Court case challenging the constitutionality of § 50-2. The District Court granted the motion and stayed the proceedings as to Harmon. However, the Court denied the motion as to Kean and allowed him to proceed with his facial challenge to the ordinance. Based on Kean's challenge, the District Court declared § 50-2 unconstitutional and enjoined its enforcement. Once the District Court declared the ordinance unconstitutional and enjoined the enforcement of the ordinance, the Municipal Court case against Harmon had to be and was dismissed. The District Court then vacated the stay as to Harmon, awarded Harmon and Kean damages and attorney's fees.

The United States Supreme Court in *Younger v. Harris*, 401 U.S. 37, 41 (1971), held that a federal court cannot enjoin a pending state court proceeding or grant declaratory relief that would effectively enjoin a state proceeding. *Accord Samuels v. Mackell*, 401 U.S. 66 (1971). In *Younger*, one of the plaintiffs had been indicted in a California state court

and charged with violation of the California Criminal Syndicalism Act. He filed a complaint in the federal district court, asking the court to enjoin the district attorney from prosecuting him, and alleging that the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments. Three other plaintiffs joined in the suit, claiming that the prosecution of Harris would inhibit their exercise of their first amendment rights. Citing 28 U.S.C. § 2283 and "longstanding judicial policy," the Court held that the judgment of the District Court which had enjoined the district attorney from prosecuting under the California statutes, was a violation of the national policy forbidding federal courts from staying or enjoining pending state court proceedings except under special circumstances. *Id.* at 40-41. The special circumstances that would allow federal intervention are where irreparable injury is real and immediate, where the state law is flagrantly violative of the constitution, or where there is a showing of bad faith or harassment. The Court held that the cost of having to defend oneself in a criminal proceeding was not irreparable injury. "[T]he threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* at 45. "It is undoubtedly true . . . that '[a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.' But this sort of 'chilling effect,' . . . should not by itself justify federal intervention." *Id.* at 50 (citations omitted). The Court held that none of the special circumstances existed in that case and that the federal courts could not interfere with the state court proceeding. The Court held that the other three plaintiffs had no standing to sue because they had not been threatened with prosecution under the California statute and the claimed "chilling effect" of Harris' prosecution was insufficient to give them standing. *Id.* at 41.

In this case, the District Court and the Eighth Circuit agreed that there was no evidence of harassment or of other special circumstances that would justify its intervention in the state court proceeding. But the District Court, by continuing the suit with Kean as a plaintiff and ultimately declaring § 50-2 to be unconstitutional and enjoining its enforcement, effectively interfered with the Municipal Court proceeding against Harmon. The Municipal Court could not continue with a prosecution under an ordinance that the District Court has held to be unconstitutional and enjoined its enforcement. So after the District Court found the ordinance unconstitutional in Kean's case, and enjoined its enforcement, the City had no choice but to dismiss its case against Harmon, who was reinstated as a plaintiff, and granted summary judgment by the District Court. The Municipal Court was never allowed the opportunity to determine whether Harmon had in fact violated the ordinance, or whether the ordinance was an unconstitutional violation of the First Amendment. This is exactly the result that the *Younger* abstention doctrine was meant to prevent. The District Court and the Eighth Circuit justified the continuation of the case with just Kean as a plaintiff by finding that the *Younger* doctrine does not apply to Kean.

Kean's relationship to Harmon cannot be ignored and in fact, it determines whether Kean's federal action should have been barred by *Younger*. The Eighth Circuit incorrectly ignored the relationship between Harmon and Kean. In *Hicks v. Miranda*, 422 U.S. 332, 348 (1975), the Court held that a plaintiff whose interests are intertwined with the interests of the plaintiff who is being prosecuted in state court is similarly barred from seeking injunctive or declaratory relief in federal court under *Younger*.

> Appellees had a substantial stake in the state proceedings, so much so that they sought federal relief, demanding that the state statute be declared void and their films be returned to them. Obviously, their interests and those of their employees were intertwined and, as we have pointed out, the federal action sought to interfere with the pending state prosecution. Absent a clear showing that appellees, whose lawyers also represented their employees, could not seek the return of their property in the state proceedings and see to it that their federal claims were presented there, the requirements of *Younger v. Harris* could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed. The rule in *Younger v. Harris* is designed to "permit state courts to try state cases free from interference by federal courts," *Id.*, 401 U.S., at 43, 91 S. Ct., at 750, particularly where the party to the federal case may fully litigate his claim before the state court. Plainly, "[t]he same comity considerations apply," *Allee v. Medrano*, 416 U.S. 802, 831 (Burger, C. J., concurring), where the interference is sought by some, such as appellees, not parties to the state case.

Id. at 348-49. In *Stivers v. Minnesota*, 575 F.2d 200, 203 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979) the court held that dismissal of a federal action on the basis of the *Younger* decision was proper, even though plaintiffs were not parties in state proceedings, where plaintiffs' pleadings indicated that their interests were closely intertwined with the interest of co-plaintiffs who were state court parties,

plaintiffs' only standing to challenge the state statute arose from alleged impact which the state injunction issued against co-plaintiffs and the association would have on plaintiffs as members of the association, and plaintiffs sought by the federal action to interfere with state proceedings. The court found that the plaintiffs had made no effort to distinguish their interests from the interests of the co-plaintiffs who were parties in the state court action. *Id.*

Kean and Harmon have made no effort to distinguish their interests from each other's before the District Court or the Eighth Circuit. They together have shared their message together. Kean's claimed damages are based on Harmon's receiving a citation; he has never personally been cited or arrested under § 50-2. Virtually all of the facts recited in the District Court's orders and the Eighth Circuit's opinion refer to the Respondents as "plaintiffs" or "appellees" and makes no real distinction between Harmon and Kean. Harmon and Kean jointly sought in this single court action a declaration that § 50-2 was unconstitutional and injunctive relief to prevent enforcement of the ordinance. When the District Court granted the requested relief and enjoined any enforcement of the ordinance, it effectively decided the Municipal Court case. When the District Court reinstated Harmon's claims and granted her summary judgment in its May 26, 1998 order, it made no new factual findings because the facts are identical as to the two plaintiffs. Clearly, Harmon's and Kean's interests are intertwined.

Because Kean's claims were not dismissed or even stayed until resolution of Harmon's Municipal Court case, the result of the present case was exactly what *Younger* taught us should not happen; the District Court found the ordinance unconstitutional on its face, and as applied to Kean, whose

situation was identical in all respects to Harmon, and enjoined the City from enforcing it; the prosecutor was forced to dismiss the case against Harmon, and Harmon was able to reinstate her federal claims. The Municipal Court never got the opportunity to even determine whether Harmon's activities fell within the ordinance, let alone whether the ordinance was unconstitutional. Thus Kean and Harmon effectively took an end run around *Younger*. And now, although the Eighth Circuit found that the District Court should not have declared the ordinance unconstitutional or enjoined its enforcement, the Eighth Circuit left in place Harmon's reinstatement to the lawsuit which resulted from the improper injunction. The Eighth Circuit essentially emasculated *Younger* by not finding that both Kean's and Harmon's claims should have been dismissed.

CONCLUSION

The City of Kansas City, Missouri passed an ordinance in 1967 banning certain types of sales on the public sidewalks. In 1996, a police officer wrote a ticket to Jill Harmon because he mistakenly believed that she had violated that ordinance. The City took no action against Ms. Harmon except that its Municipal Court ultimately dismissed the charge against her. But the City will now have to pay a $25,000 to Jill Harmon because she mistakenly received a ticket, $15,000 to John Kean who witnessed her receiving a ticket, and $73,575 to their attorney (subsequently increased to include appellate time for a total of $103,575). The City's ordinance has not been held invalid; the Eighth Circuit Panel only found that the officer, who is not an employee of the City, unconstitutionally applied the ordinance when he wrote the ticket, and that his mistaken interpretation of the facts is somehow attributable to the City. Had the Eighth Circuit

Panel agreed that the *Younger* doctrine applied to both claims in this matter, the District Court could have abstained, the Municipal Court could have then decided that the ordinance did not apply to Harmon's activity, and that would have been the end of it. For the City to be liable for over $139,000 under these circumstances is plainly a result that both *Monell* and *Younger* were meant to prevent.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED OCTOBER 20, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-3630

Jill Harmon and John Kean,

Appellees,

v.

City of Kansas City, Missouri,

Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: April 20, 1999
Filed: October 20, 1999

BEFORE: RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and MAGNUSON,[2] District Judge.

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1. The Honorable Roger L. Wollman succeeded the Honorable Pasco M. Bowman as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999.

2. The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

Appendix A

MAGNUSON, District Judge.

Appellant City of Kansas City, Missouri ("the City") appeals an order by the District Court declaring ordinance number 50-2 of the Kansas City Municipal Code ("section 50-2") unconstitutional on its face and as applied to Appellees John Kean and Jill Harmon. Section 50-2 regulates the sale and advertisement of certain products on Kansas City streets and sidewalks. We conclude that the District court properly refused to abstain from this case and also properly ruled that Appellee Kean has standing to assert an as applied challenge for damages. However, because Kean and Harmon now lack standing to seek injunctive relief, and because the District court need not have determined the constitutionality of section 50-2 on its face, we affirm in part and vacate in part the decision of the District Court.

I.
Background

Since 1996, Appellees John Kean and Jill Harmon, also known as the "Butterflies," have actively sought to spread their beliefs regarding personal, social, and political issues on the public sidewalks in Kansas City. Their message, in part, has been delivered by the distribution of "symbolic expressions" regarding the homeless and the hungry, including anklets, bracelets, and wood products. In addition, they distribute pamphlets with pictures to address topics such as equality, hunger, prevention of and recovery from abuse, healing, spiritual injuries, and love. None of these items contain words. Although Appellees do not sell these items, they do request a donation for them. The money raised from

donations is used to create more pamphlets and jewelry and to purchase food for the hungry.

While sharing their message, Appellees have been harassed on multiple occasions by the Kansas City Police Department. Twice, police helicopters flew so low over Appellees that they could feel the wind from the helicopter's blades. Appellees also experienced close police motorcycle ride-bys and a police car stakeout. Further, Kean had been threatened with arrest by the Kansas City Police Department four times, including twice for alleged violations of section 50-2. On June 7, 1996, Kean was arrested for violating a Kansas City ordinance which placed an 11:00 P.M. curfew on the distribution of leaflets in the Westport area of Kansas City.[3] Appellees were also arrested for blocking a sidewalk by causing a crowd to gather, in violation of another section of the municipal code.

On July 19, 1996, Harmon and Kean had spread out their blankets and trinkets on the corner of 11th and Main Street in Kansas City, when two police officers approached them. The officers told Appellees to leave the area or they would be arrested. In the midst of this encounter, a woman in the crowd approached Harmon and inquired as to the price of a bracelet. Harmon requested a seven-dollar donation. At that point, an officer informed Harmon that she had violated section 50-2 of the Kansas City Code by attempting to sell an item on a city sidewalk and issued her a citation. In toto, section 50-2 reads:

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3. Kean and Harmon filed an action in federal court contesting the validity of that statute under the First and Fourteenth Amendments. The District Court found the ordinance unconstitutional.

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> No person shall sell, solicit, or offer for sale or hawk or peddle any article, thing, or personal service, except newspapers and magazines, in or upon any street, sidewalk, alley, public way, public building, public park or place in the city; provided that nothing contained in this section shall be construed to prohibit the sale of articles from traveling florists or grocers; hucksters, as defined in Section 40-108; food or beverage wagons, including any street vendor of food regulated by the Health Department as a food vendor selling food in or upon any street, sidewalk, alley, public way, building or place not controlled by the Board of Parks and Recreation Commissioners; or vendors of milk and dairy products and hot tamales; or producers of farm products as defined in RSMo 71.630; or businesses which are wholly located on private property but which sell articles to persons on the public sidewalk; provided, further, this section shall not be deemed to apply to the sale of any personal property at any established place in any public building, public park or public place by express authority of the government agency in control thereof.

Kansas City Mun. Code 50-2. Thereafter, Appellees left the area, and because of fear of prosecution, restricted their activities to the Westport area.

On April 7, 1997, Appellees filed a pro se action in District Court against the City seeking damages and

declaratory and injunctive relief on the basis that section 50-2 is facially unconstitutional and unconstitutional as applied under the First and Fourteenth Amendments. On May 13, 1997, the City filed a motion to dismiss or to stay the proceedings in the federal case. The City first asserted that Younger abstention was proper because a case was pending against Harmon in municipal court for an alleged violation of section 50-2 in which Harmon had filed a motion challenging the constitutionality of the ordinance.[4] Secondly, the City argued that Kean lacked standing to challenge the constitutionality of the ordinance because he had neither been arrested nor charged with violating section 50-2.

The District Court applied Younger abstention as to Harmon and therefore, dismissed her from the federal suit without prejudice. As to Kean, the court refused to abstain from the case and further, found that he possessed standing to challenge the ordinance despite the fact that he had not been arrested or given a citation. The District Court proceeded to hold that section 50-2 was unconstitutional as applied to Kean and on its face and therefore, granted summary judgment in his favor. Subsequent to this ruling, the City dismissed its municipal case against Harmon. On May 26, 1998, the District Court granted Harmon's motion for reconsideration and reinstated her claim, extending the scope of the April 2 summary judgment order to Harmon based on its belief that both Appellees engaged in the same activity at the same time.

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4. The municipal court charge was filed against Harmon on the same day as Harmon received the citation.

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On June 11, 1998, the District Court held a bench trial to determine damages for Harmon and Kean, resulting in an award of $25,000 to Harmon and $10,000 to Kean. The court later awarded a total of $73,576.25 in attorney's fees. Moreover, the court permanently enjoined the City from enforcing section 50-2. The City now appeals the District Court's decision as to the constitutionality of section 50-2 and the monetary and injunctive relief issued pursuant thereto.

II.
Abstention

The District Court's initial application of the Younger abstention doctrine to Harmon's suit is not disputed. However, the City does challenge the court's refusal to abstain from Kean's suit and its later reinstatement of Harmon's case, claiming that such action interfered with an ongoing state proceeding. In *Younger v. Harris*, 401 U.S. 37, 43-44 (1971), the Supreme Court advanced the position that federal courts should refrain from interfering with pending state judicial proceedings absent extraordinary circumstances. Under *Younger*, abstention is warranted if the action complained of constitutes the basis of an ongoing state judicial proceeding, the proceedings implicate important state interests, and an adequate opportunity exists in the state proceedings to raise constitutional challenges. *See Fuller v. Ulland*, 76 F.3d 957, 959 (8th Cir. 1996).

The District Court did not abstain from Kean's suit because it found that the actions complained of did not constitute the basis of an ongoing state judicial proceeding.

Simply put, Kean was not charged in municipal court. The City argues, however, that by proceeding with Kean's case in federal court, the District Court might have interfered with Harmon's case in state court because the "municipal court could not continue with a prosecution under an ordinance that a federal court has held to be unconstitutional." (Appellant's Br. at 12.) But the mere fact that a co-plaintiff has been charged under a statute that is being challenged as unconstitutional does not amount to federal intervention. *See Womens Servs., P.C. v. Douglas*, 653 F.2d 355, 356 (8th Cir. 1981) (citing *Younger*, 401 U.S. at 43-54.) Accordingly, we conclude that the District court acted within its discretion in refusing to abstain from Kean's case. *See Fuller*, 76 F.3d at 959 (reviewing a district court's decision on Younger abstention under an abuse of discretion standard.)

The City further argues that the District Court was required to abstain because Kean's rights were intertwined with Harmon's rights; therefore, proceeding with the federal case would interfere with the municipal court's ruling.[5]

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5. Appellees contend that because this issue was not raised at the District Court level, the City has waived its right to pursue it here. *See Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 375-76 (8th Cir. 1997). In response, the City points to the District Court's statement that "[r]egardless of [Kean's] relationship to Harmon, Kean's right to proceed is not affected by Harmon's ongoing municipal proceedings." (Appellee's Brief at 12) (citing *Womens Servs.*, 653 F.2d at 358-59). This statement alone is insufficient to show that the City previously advanced an intertwining interest argument. However, the court's reliance on *Womens Servs.*, which predicates its abstention decision on an intertwining interest analysis, convinces us that the trial court considered this issue and accordingly, we will consider it on appeal.

Admittedly, in extraordinary circumstances where the federal plaintiff is actually attempting to interfere with the state lawsuit, a showing of intertwining interests may warrant abstention. *See Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975); *Stivers v. Minnesota*, 575 F.2d 200, 202-03 (8th Cir. 1978). But those extraordinary circumstances are not present here. Kean did not take any action (such as seeking a stay of the state court proceedings) which would interfere with the state proceedings against Harmon. *See Womens Servs.*, 653 F.2d at 356-57 (noting that "a crucial aspect of this case is that the federal plaintiffs did not seek to enjoin the . . . criminal proceeding against [their co-plaintiff]").

As to Harmon, the District Court reinstated her as a plaintiff in the federal case only after the City dismissed its claims against her in municipal court. Thus, Harmon's federal suit could not interfere with a state court proceeding because the state proceeding had ceased. *See In re Otter Tail Power Co.*, 116 F.3d 1207, 1215 (8th Cir. 1997) (summarizing that Younger abstention is inapplicable in the absence of ongoing state proceedings). It is clear from the foregoing that the City could not invoke the Younger bar in these circumstances.

III.
Standing

The District Court determined that even though Kean had not been arrested or prosecuted for violating section 50-2, he maintained standing because Kansas City police officials had threatened and harassed him numerous times, using section 50-2 as their justification. In response, the City continues to argue that Kean lacks standing to pursue an as

applied challenge because he was not arrested under that ordinance. The City also now urges that Kean does not have standing because his activities did not violate the terms of section 50-2.

We review for clear error whether Kean possesses Article III standing to assert an as applied challenge. *See United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994); *Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741, 746-47 (8th Cir. 1991). Standing to challenge a statute or ordinance as applied is present when the challenger has experienced a direct injury or will soon sustain a direct injury redressable by the court. *See Alexander v. City of Minneapolis*, 928 F.2d 278, 281-82 (8th Cir. 1991) (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)); *Postscript Enter., Inc. v. Westfall*, 771 F.2d 1132, 1135-36 (8th Cir. 1985). "[I]t is not necessary that [the plaintiff] first expose himself . . . to actual arrest or prosecution to be entitled to challenge a statute that he . . . claims deters the exercise of his . . . constitutional rights." *Id.* at 1135 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

It is clear that in the present case, Kean had proper standing to raise a question concerning the constitutionality of the application of section 50-2. The alleged threats of prosecution on which the District Court based its standing conclusion were not "imaginary or speculative." *Younger*, 401 U.S. at 42. While sharing his message with others, Kean was involved in multiple incidents of harassment by the Kansas City Police Department. Despite the fact that Kean

has never been arrested or charged with violating section 50-2, we conclude that Kean adequately showed a genuine threat that the ordinance would be enforced against him and his activities in the future. Accordingly, Kean had standing to pursue his claim for damages in District Court.[6]

Notwithstanding the fact that Harmon and Kean had standing to pursue a claim for damages, neither one now enjoys standing to seek injunctive relief. A federal court bears the burden of examining standing at all stages of litigation, even if the parties do not raise the issue themselves. *See Valley Forge Christian College*, 454 U.S. at 472. In light of the City's admission that it now "agrees that Kean's activities consisting of distributing his pamphlets, soliciting donations, and conveying his message through talking to passersby are

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6. The City also now argues that the responsibility of enforcing the ordinance lies with the police officer who served Harmon a citation. The legal separation of Kansas City and the Kansas City Police Department, however, does little to weaken Kean's claim to standing under these circumstances. Under Missouri law, the Board of Police Commissioners exerts exclusive control over the Kansas City Police Department. *See* Mo. Rev. Stat. § 84.460; *see generally* Mo. Rev. Stat. §§ 84.350 *et seq.* As the District Court noted, "the City is not liable for wrongs committed by the police." *See Crigler v. City of St. Louis*, 767 F. Supp. 197, 199 (E.D. Mo. 1991); *Hasenyager v. Board of Police Comm'rs of Kansas City*, 606 S.W.2d 468, 472 (Mo. Ct. App. 1980). However, the District Court also correctly asserted that the City is liable for the "predictable and proximate" results of passing the Ordinance. Although the specific tactics used by the Police Department to enforce section 50-2 cannot be attributed to the City, the mere attempt to enforce 50-2 can. Because it was on this limited basis that the District Court awarded Kean damages against the City, Kean had standing to seek damages.

fully protected under the constitution" and that "[t]hese activities are not prohibited under section 50-2" (Appellant's Br. at 19), any previous substantial controversy between the parties has effectively dissipated. The mere fact that injurious activity took place in the past does nothing to convey standing to seek injunctive relief against future constitutional violations. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1019 (1998) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). "The fact of past damages, 'while presumably affording [the plaintiff] standing to claim damages . . . does nothing to establish a real, immediate threat that he would again' suffer similar injury in the future." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). As a result, Appellees will not benefit from the injunctive relief the District Court ordered. Accordingly, the portion of the District Court's order which enjoined the City from enforcing section 50-2 is vacated.

IV.
Summary Judgment

We review the District Court's grant of summary judgment de novo, using the same standard under Federal Rule of Civil Procedure 56(c) as applied by the District Court. *See Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 386 (8th Cir. 1996); *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1219 (8th Cir. 1997). Under Rule 56(c), summary judgment is warranted

when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The material facts in this case are undisputed. Section 50-2 does not prohibit the handing out of leaflets or the solicitation of donations — it merely forbids the sale of goods not explicitly permitted. The City now concedes that Kean and Harmon's activities were noncommercial in nature and did not fall within the ambit of section 50-2. Furthermore, as the City wisely admits, Appellees' distribution of jewelry and other items, coupled with copies of the pamphlets which they use to spread their message, constitutes "core speech" fully protected by the First Amendment. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997).

Despite these admissions, or perhaps because of them, the City argues that section 50-2 cannot be unconstitutional as applied to Kean and Harmon because the ordinance simply does not apply to them. This argument might carry some weight if Appellees were seeking a declaratory judgment against the constitutionality of 50-2 before it took effect. However, that is not the case here. Section 50-2 *has been* applied to Kean and Harmon. No amount of linguistic argument, however correct, can erase this fact. Harmon was formally cited for violating the ordinance; Kean was threatened with sanction by officers who advanced section 50-2 as their justification. If the City were to absolve itself of liability for prior wrongs simply by recanting an

interpretation of a statute it had wrongly applied, it would "create a serious gap in the protection intended by federal civil rights actions." (Appellees' Br. at 26.)[7] By unjustifiably stifling activity that was protected by the First Amendment, the application of section 50-2 was clearly unconstitutional as applied to Kean and Harmon.

Having answered the dispositive as-applied question, the District Court, however, unnecessarily proceeded to considering the constitutionality of the ordinance on its face. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991); *Jacobsen v. Howard*, 109 F.3d 1268, 1274-75 (8th Cir. 1997). Because ruling on the facial constitutionality of an ordinance when such action is not necessary to grant the plaintiffs relief risks unduly interfering with attempts by local governments to combat serious local problems, *cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975), we vacate the portion of the District Court's Order which declared section 50-2 unconstitutional on its face and enjoined its enforcement.

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7. The City can, of course, impose valid time, place, and manner restrictions on speech which is protected by the First Amendment, provided that the regulations "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). However, because the City admits that section 50-2 does not regulate Appellees' noncommercial activities, it does not attempt to defend the constitutionality of applying the ordinance to Kean and Harmon. In light of that silence, we will not examine the issue.

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V.
Attorney Fees

The District Court held that in light of Appellees prevailing over the City, Appellees were entitled to an award of attorney fees pursuant to 42 U.S.C. § 1988. The court then found that the fees and hours calculated were reasonable. The City challenges the award of fees on the basis of unitemized time sheets and excessive hours expended.

We review a district court's decision whether to award attorney's fees for abuse of discretion. Title 42 of the United States Code § 1988 provides in pertinent part that in a § 1983 action, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. The decision to award attorneys fees under that statute rests with the broad discretion of the district court and will not be reversed absent an abuse of discretion. *Jenkins v. Missouri*, 127 F.3d 709, 713 (8th Cir. 1997). Given the facts of this case and the District Court's well-reasoned fee order, we affirm the award of fees.

VII.
Damages Award

Pursuant to § 1983, a prevailing party may receive a damage award from the court. Here, after carefully considering the facts of the case, the District Court awarded Kean $10,000 and Harmon $25,000. After reviewing the District Court's findings of fact under a clearly erroneous

standard, *see Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1017 (8th Cir. 1988), we affirm the District Court's award.

VIII.
Conclusion

The District Court is affirmed on its treatment of the Younger-abstention doctrine and as to Appellees' constitutional challenge to section 50-2 as applied to them. Furthermore, the District Court was correct in determining that Kean had standing to seek damages. However, because the District Court unnecessarily considered the constitutionality of section 50-2 on its face, that portion of the District Court's opinion is vacated. Furthermore, in light of the City's admission that section 50-2 does not apply to the noncommercial activities of Kean and Harmon, the portion of the District Court's order which grants Appellees injunctive relief against the City is vacated as well.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION GRANTING MOTION TO RECONSIDER AND REINSTATING JILL HARMON AS A PLAINTIFF DATED AND FILED MAY 26, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 97-0411-CV-W-3

JILL HARMON and JOHN KEAN,

Plaintiffs,

vs.

CITY OF KANSAS CITY, MO.,

Defendant.

ORDER GRANTING MOTION TO RECONSIDER AND REINSTATING JILL HARMON AS A PLAINTIFF

Pending is Plaintiffs' Motion to Reconsider its earlier ruling dismissing Jill Harmon without prejudice. Harmon was dismissed because state proceedings were instituted and not completed, thereby necessitating abstention. Since the Court's rulings, those municipal charges have been dismissed.

Appendix B

Defendant contends that reinstatement is inappropriate because it has not had the opportunity to conduct any discovery as to Harmon's allegations. Although this is true, the Court does not view this as an insurmountable barrier. Nearly all of the relevant facts were agreed to by the parties — including the fact that the two Plaintiffs engaged in the same activity and that they were always together when distributing their pamphlets. In terms of liability, it does not appear that discovery is crucial. However, discovery would be crucial with respect to Harmon's claim of damages.

The interests of judicial economy and avoiding unnecessary burdens on both the Plaintiffs and the Defendant are not served by forcing Harmon to start anew with her own separate lawsuit. Accordingly, the Motion to Reconsider (Doc. # 45) is granted, and Jill Harmon is reinstated as a plaintiff. Based on the undisputed fact that the Plaintiffs engaged in distributing pamphlets together, and based on the undisputed facts about the character and nature of that activity, the Court's entry of partial summary judgment is extended to include her. Defendant will be permitted to depose Harmon in order to prepare for the damages hearing currently set for June 11, 1998. If Defendant uncovers some facts bearing on liability that were not previously known, Defendant may file a Motion to Reconsider. If the hearing needs to be rescheduled in order to permit scheduling of the deposition, the parties should contact the Court.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 5/26/98

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DISMISSING PLAINTIFF JILL HARMON WITHOUT PREJUDICE, PARTIALLY GRANTING PLAINTIFF JOHN KEAN'S MOTION FOR SUMMARY JUDGMENT AND ENJOINING ENFORCEMENT OF SECTION 50-2 OF THE CODE OF KANSAS CITY, MISSOURI, AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED APRIL 2, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 97-0411-CV-W-3

JILL HARMON and JOHN KEAN,

Plaintiffs,

vs.

CITY OF KANSAS CITY, MO.,

Defendant.

ORDER (1) DISMISSING PLAINTIFF JILL HARMON WITHOUT PREJUDICE, (2) PARTIALLY GRANTING PLAINTIFF JOHN KEAN'S MOTION FOR SUMMARY JUDGMENT AND ENJOINING ENFORCEMENT OF SECTION 50-2 OF THE CODE OF KANSAS CITY, MISSOURI, AND (3) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Appendix C

Plaintiffs have filed this suit seeking injunctive and declaratory relief in an attempt to have Section 50-2 of the City Code of Kansas City declared unconstitutional. Plaintiffs also seek monetary damages. For the reasons set forth below, (1) Plaintiff Harmon is dismissed without prejudice, (2) partial judgment will be entered in Plaintiff Kean's favor with respect to liability and equitable relief only, and (3) Defendant's Cross Motion for Summary Judgment is denied.

1. BACKGROUND[1]

The record reflects the following uncontroverted facts. The Plaintiffs, Jill Harmon and John Kean (who often call themselves "the Butterflies") are dedicated to conveying messages on various topics which they believe to be important personal, social, and political issues. These issues include, but are not limited to, equality, hunger, abuse prevention and preservation of First Amendment rights. They communicate their messages on the public sidewalks of Kansas City, Missouri (the "City"). Typically, Plaintiffs engage in their activities in the following manner:

- They spread a blanket or similar item on the ground on, or near, the sidewalk in such a manner so as not to block passage on the sidewalk;

- They place on the blanket copies of the various pamphlets and symbolic expressions — "artifacts"

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1. Much of the background is derived from Plaintiffs' statement of uncontroverted facts which, in large measure have been agreed to by the Defendant.

which are "inextricably intertwined" with the pamphlets;

- Plaintiffs sit on or stand immediately adjacent to the blanket and wait for people to come by and inquire about the materials or the Plaintiffs' message;

- Visitors are invited to sit on, or near, the blanket to hear Plaintiffs relate their beliefs and discuss the meaning of their message, writings, and artifacts;

- Plaintiffs routinely share food with those who state that they are hungry;

- Plaintiffs do not shout out to passersby or otherwise entice visitors except through their display.

Plaintiffs' core beliefs center around the wisdom and benefits of sharing, and can be summarized as "sharing makes one many." To assist them in communicating their message, Plaintiffs prepare and distribute a series of nineteen (19) pamphlets which they call "Inner Landscapes." The pamphlets deal with such topics as equality, hunger, prevention of and recovery from abuse, healing, "spiritual injuries," and love. Each pamphlet contains twenty-eight (28) aphorisms and four (4) illustrations that communicate a story both verbally and visually. These pamphlets are illustrated so that the Plaintiffs may communicate their message to those who are unable to read, do not understand the English language, or are simply more receptive to visual messages. Examples of the aphorisms found in these pamphlets include:

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- Equality series pamphlet 1 — "We should be less concerned with the color of race than the race to overcome color"

- Hunger series pamphlet 2 — "poverty struggles in the long cast shadows of selfishness"

- Abuse series pamphlet 2 — "endeavor to not be imprisoned by the worst done to Us and to be free to do what is best for Us"

- Healing and Recovery series pamphlet 2 — "responding to any problem in Our lives with anger only serves to increase Our problems and anger"

- Narrow Path series pamphlet 3 — "Our Creator does not value Us for what We own but for the love We share"

- Love series pamphlet 2 — "a reward of love is known in giving and not in expectations of what We might receive"

The "artifacts" fall into two categories: (1) beaded bracelets, anklets or necklaces that can be worn, and (2) pieces of wood upon which the Plaintiffs have burned the symbols that appear in the pamphlets. Plaintiffs provide these "visual images" of their message because they "are very well aware of the fact that not everybody in America can read. . . . We are also aware of the fact that not everybody's attracted to a message that's strictly written. The symbolic expressions provide an attempt on our behalf to attract other citizens who

may not otherwise be interested in a strictly written message." Kean Depo. at 44-45. Pedestrians who stop and converse with the Plaintiffs are offered an "artifact" of the Plaintiffs' choice along with one or more pamphlets. The Plaintiffs also request a donation for the stated purpose of enabling Plaintiffs to provide the pamphlets to those who are unable or unwilling to pay a donation to help defray the cost of producing the pamphlets. The pamphlets and artifacts are provided to interested persons regardless of whether they pay a donation. In their affidavit, Plaintiffs declared that they "use the money obtained from donations to create additional pamphlets and artifacts, to purchase food for the hungry, or the other ways which directly support the sharing of our message." Plaintiffs' Affidavit at 7. The City has not contended (and there is no evidence in the record to suggest) that the donations are not used for these purposes.

Plaintiffs have been sharing their messages — and distributing their pamphlets and artifacts — since March 28, 1996. Kean estimates that he and Harmon have engaged in this practice "hundreds" of times. On June 27, 1996, Plaintiffs filed a lawsuit challenging the constitutionality of Section 50-8 of the City Code, which prohibited the sale or distribution of "anything in and/or upon any public street, sidewalk, alley, bridge, park or other public place within the" Westport area of Kansas City, Missouri during certain portions of the day. The lawsuit was filed in this Court under case number 96-0686-CV-W-3. The next day, Plaintiffs went to a location near the Bartle Hall Complex ("Bartle Hall") to distribute their pamphlets. Bartle Hall is not in the Westport area. A private security guard working for Bartle Hall told them to move because they were violating a

municipal code, but Plaintiffs refused to leave. The guard called his supervisor, who also insisted that Plaintiffs were violating municipal ordinances. Plaintiffs suggested that the security officers contact the police, which they did. After much discussion (including a threat by the police officers to arrest Plaintiffs), the coordinator for the convention then taking place in Bartle Hall was contacted and he indicated that he had no problem with Plaintiffs' presence on the sidewalk outside the convention center. The police and the security guards left the scene.

On July 10, 1996, a preliminary injunction was issued in case number 96-0686-CV-W-3, preliminarily enjoining enforcement of section 50-8. On July 12, Plaintiffs returned to Westport to distribute their messages. A police officer approached Plaintiffs and threatened to arrest them; Plaintiffs offered him a copy of the preliminary injunction, but he refused to look at it. Eventually, the officer went away; Plaintiffs were not arrested or issued a citation, and the entire encounter lasted approximately fifteen minutes.

On July 19, 1996, Plaintiffs went to the corner of 11th and Main, which is not in Westport. Two police officers on bicycles approached Plaintiffs, blocked members of the public from their blanket, and told them they had been sent to see if Plaintiffs had "correct permits." Eventually, the officers told Plaintiffs that they could either leave and not be arrested, or they could stay, in which case they would be arrested. Plaintiffs offered to share the preliminary injunction with the officers, but the officers (correctly) noted that the injunction was not controlling because Plaintiffs were not in Westport and section 50-8 was not implicated. Plaintiffs

then advised the officers that they did not intend to leave. After many discussions between the officers and the City Attorney's Office, the officers moved their bicycles to permit a single woman to approach Plaintiffs. The woman reached for an anklet and asked Harmon how much the item cost. Harmon told the woman that a $7.00 donation was requested to help support Plaintiffs' ability to provide the pamphlets free to those who were unable or unwilling to pay for them. The officers then told Harmon that she had attempted to make a sale and she was going to be arrested for violating section 50-2. The officer gave Harmon a choice of either being arrested and taken downtown for processing or accepting the ticket and be processed at the scene. Harmon chose the latter option and was issued a ticket declaring that she "[d]id attempt to peddle or sell merchandise (ankle bracelet) on a public sidewalk. Asking for a $7.00 donation to the support of Inner Landscapes." The ticket specifies that the provision allegedly violated was section 50-2 of the municipal code, which provides as follows:

> No person shall sell, solicit or offer for sale or hawk or peddle any article, thing or personal service, except newspapers and magazines, on or upon any street, alley, public way, public building, public park or place in the city; provided that nothing contained in this section shall be construed to prohibit the sale of articles from traveling florists or grocers; hucksters, as defined in section 40-108; food or beverage wagons, including any street vendor of food regulated by the health department as a food vendor selling food in or upon any street, sidewalk, alley, public

> way, building or places not controlled by the board of Parks and Recreation commissioners; or vendors of milk and dairy products and hot tamales; or producers of products as defined in RSMo 71.630; or businesses which are wholly located on private property but which sell articles to persons on the public sidewalk; provided, further, this section shall not be deemed to apply to the sale of any personal property at any established placed in any public building, public park or public place by express authority of the government agency in control thereof.

Proceedings with respect to Harman's ticket are still pending, although they too have been delayed by agreement of the parties pending the outcome of this lawsuit. Fearing further prosecution under this ordinance, Plaintiffs have since confined much of their "First Amendment activity" to Westport.

On August 13, 1996, Plaintiffs went to Loose Park to engage in a public hunger strike as a show of support for area food pantries and to demonstrate their commitment to First Amendment principles. They contacted the Kansas City Star prior to beginning the hunger strike to increase public awareness of the effort. They also appeared on a local radio talk-show. While they were sitting in the park (which is not located in Westport), a helicopter hovered over their position and the occupants of the helicopter observed them for several minutes. In addition, two police officers on motorcycles drove by the Plaintiffs, stopped briefly and looked at the Plaintiffs, but did not speak to them. The hunger strike

continued on August 14, and a helicopter briefly hovered over their position on that day as well.

On April 26, 1997, Plaintiffs were distributing their pamphlets in Westport when a security guard approached them and told them he had received a report that someone in the area of their blanket had been smoking marijuana. In his deposition, Kean testified that earlier in the day someone had given them a pipe filled with ordinary tobacco. Based on his description, the pipe's appearance sounds similar to that of a Native American peace pipe. Kean testified that Plaintiffs were offering the pipe to people who visited their blanket. Eventually, the security guard called the police, who came and parked in a parking lot across the street and watched the Plaintiffs for a while. None of the officers said anything to the Plaintiffs.

On July 6, 1997, Plaintiffs were again in Westport when they were approached by a police officer and told to go home. He told the Plaintiffs they did not have a license to sell and they were violating municipal ordinances. Plaintiffs provided the officer with a copy of the preliminary injunction, and upon reading the injunction the officer began to argue the merits and conclusions of the injunction. Ultimately, the officer threatened to arrest Plaintiffs, but never did so. He eventually left the scene, and Plaintiffs continued distributing their message.

Appendix C

I. DISCUSSION

A. Jill Harmon's Ability to Proceed as a Plaintiff

On June 16, 1997, the Court partially granted the City's Motion and stayed proceedings in this case as they relate to Jill Harmon. The stay was predicated on *Younger v, Harris*, 401 U.S. 37 (1971) in light of the charges pending against Harmon in Municipal Court. She was not dismissed at that time because the case would continue with Kean as a Plaintiff, so "the Court believe[d] it prudent to simply stay proceedings in this Court as they relate to Harmon." Harmon now asks that the stay be lifted; however, in light of the current status of this case and the Court's understanding of *Younger*, Harmon is dismissed as a plaintiff in this suit.

Generally speaking, *Younger* prohibits federal courts from enjoining ongoing state proceedings.[2] *Younger* also prohibits federal courts from granting declaratory (or other equitable) relief that would effectively enjoin state proceedings. "At the same time, however, the [Supreme] Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances — where irreparable injury is both great and

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2. In its June 16 Order, the Court characterized the ongoing proceedings in Municipal Court as "criminal," and *Younger* itself addressed the propriety of enjoining a state court proceeding. Plaintiffs contend that municipal court proceedings are civil in nature. However, even if the pending proceedings against Harmon are civil, *Younger* abstention still applies. *Amerson v. State of Iowa*, 94 F.3d 510, 512 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 696 (1997) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)).

immediate, where the state law is flagrantly and patently violative of express constitutional prohibitions, or where there is a showing of bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." *Mitchum v. Foster*, 407 U.S. 225, 230 (1972) (internal quotations and citations omitted). "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). Harmon contends that she has suffered the sort of harassment described in these cases and therefore *Younger* abstention should not apply.

"If a federal plaintiff has an opportunity to raise his or her constitutional claims in the state criminal proceeding, or the federal plaintiff cannot prove bad faith or harassment in the state prosecution, equitable relief is unwarranted even if the state statute is unconstitutional." *Anderson v. Schultz*, 871 F.2d 762, 765 (8th Cir. 1989). "In this context, bad faith generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction. Bad faith and harassing prosecutions also encompass those prosecutions that are initiated to retaliate for or discourage the exercise of constitutional rights. A showing that a prosecution was brought in retaliation for or to discourage the exercise of constitutional rights will justify an injunction regardless of whether valid convictions conceivably could be obtained." *Lewellen v. Raff*, 843 F.2d 1103, 1109-10 (8th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (internal citations and quotations omitted). Harmon was able to assert

section 50-2's unconstitutionality as a defense in the municipal proceeding. There is no indication that the City instituted the proceedings without a reasonable chance of prevailing, and the record does not support a finding that the City instituted proceedings against Harmon because she was exercising her First Amendment rights (as opposed to a bona fide belief that Harmon was violating the ordinance). Finally, the encounters described in Kean's deposition do not demonstrate the harassment necessary to overcome *Younger*. The June 1996 incident outside Bartle Hall involved a response to a citizen's complaint that ultimately resulted in no action being taken. The fact that the police responded to a citizen's complaint suggests that they were not simply looking for an excuse to interfere with Plaintiffs' activities. The same can be said of the April 26, 1997 incident. The August 1996 incidents in Loose Park cannot really be considered harassment; at worst the officers observed the Plaintiffs, but they did not speak to or interfere with their hunger strike. The July 12, 1996 and July 6, 1997 incidents in Westport are troubling — but more for the potential that the actions violated the preliminary injunction issued in 96-0686-CV-W-3.[3] However, in light of the span of time between them and the admittedly large number of occasions when Plaintiffs were not bothered, even these two incidents do not suggest that the officers were acting with the specific intent of denying Plaintiffs their First Amendment rights, particularly when compared to the events described in

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3. In their affidavit, Plaintiffs also report being arrested on September 15, 1997 while distributing pamphlets. They allege this arrest was "in clear contravention of this Court's order" in Case No. 96-0686-CV-W-3, but provide no details or information about the incident.

Lewellen. 843 F.2d at 1110-12 & n.10. Inasmuch as final judgment is to be entered, the Court's caution-based decision to stay proceedings as to Harmon is no longer justified. Therefore, Plaintiff Jill Harmon is dismissed without prejudice.

B. John Kean's Ability to Proceed as a Plaintiff

The City contends (as it did when it initially sought a stay or dismissal pursuant to *Younger*) that the pending proceedings against Harmon and the fact that he has not been charged with violating section 50-2 bar Kean's ability to proceed. The Court reiterates its holding that Kean's ability to prosecute his claim is not affected by the pending charges against Harmon or the fact that he has not been charged or arrested for violating section 50-2.

First, *Younger* abstention does not apply to Kean. Regardless of his relationship to Harmon, Kean's right to proceed is not affected by Harmon's ongoing municipal proceedings. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975), *Womens Services, P.C. v. Douglas*, 653 F.2d 355, 358-59 (8th Cir. 1981). Second, Kean has shown a genuine threat that the ordinance will be enforced as to him and his activities in the future, thereby giving him standing to pursue his claims. *E.g.*, *City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987); *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974); *Postscript Enter., Inc. v. Westfall*, 771 F.2d 1132, 1135-36 (8th Cir. 1985).

The City, while acknowledging that the standard for issuing a permanent injunction is the same as for issuing a

preliminary injunction except that the plaintiff's actual success (as opposed to likely success) on the merits is considered, *e.g.*, *United States v. Green Acres Enter., Inc.*, 86 F.3d 130, 132-33 (8th Cir. 1996), contends that Kean cannot meet the standard for granting injunctive relief. With this adaptation to the standard, injunctive relief can be issued only if (1) Kean prevails on the merits, (2) he will suffer irreparable injury, (3) the balance of harm to Kean when compared to the harm to the City favors equitable relief, and (4) the public interest is served. As discussed below, Kean prevails on the merits of his First Amendment claim. This automatically suffices as irreparable injury. *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1140-41 (8th Cir. 1996) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Moreover, the City has no legitimate interest in enforcing an unconstitutional ordinance or in applying a valid ordinance in an unconstitutional manner. Similarly, the public interest is not served when the City engages in activity that contravenes the First Amendment. Consequently, if section 50-2 is unconstitutional, Kean is entitled to equitable relief.

C. Constitutionality of Section 50-2 as Applied to Kean

The City does not deny that its sidewalks are considered a public forum for First Amendment purposes. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). The City also does not deny that it must permit a wide range of expressive activity on the sidewalks; in fact, it admits that section 50-2 "does not prohibit the distribution of pamphlets or the solicitation of donations." Defendant's Suggestions in Opposition to Plaintiffs' Motion for Partial Summary

Judgment and in Support of the City's Motion for Summary Judgment at 9. The ordinance, then, does not prohibit Kean from handing out literature designed to raise awareness of his causes or from asking for donations to enable him to spread his message. The City argues that it may outlaw all proposals suggesting an exchange of money for items because such proposals suggest a commercial transaction entitled to less (or no) First Amendment protection than the activities permitted by the ordinance. In arguing that Kean is engaging in commercial activity, and that his speech is "merely commercial speech," the City overlooks the true character of Kean's message. The test for determining whether speech is "commercial speech" is whether the speech proposes a commercial transaction. *E.g.*, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The facts agreed to by the parties demonstrate that (1) Kean waits for people to talk to him before promulgating his message, and (2) donations are voluntary; passersby are free to walk away with the pamphlets, wood-burnings and jewelry even if they decline to give a donation. These features (particularly the latter) demonstrate that Kean is not proposing a "commercial transaction" — commercial transactions do not include a mere option to provide monetary compensation. Beyond this obvious distinguishing characteristic, the nature of Kean's activities demonstrate they are entitled to First Amendment protection.

Had Kean solicited donations in return for his pamphlets, his activity would have been fully protected by the First Amendment. The City does not seem to dispute this; rather, the City sees a difference between soliciting donations for

literature and soliciting donations for the artifacts. In the circumstances of this case, the First Amendment does not. It is clearly established "that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Such appeals do not lose their protection merely because the materials and items are distributed with the appeals, or because the materials or items are exchanged for money or donations rather than given away. *E.g., Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Virginia State Bd. of Pharmacy*, 425 U.S. at 761; *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1368 (9th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3509 (Mar. 30, 1998) (No. 97-1228). Focusing first on the pieces of wood upon which Plaintiffs burned the images used in their pamphlets, it is quite clear that these materials conveyed a message. The symbols appear in their pamphlets with written words indicating that the symbols represent concepts such as hunger, sharing, and caring. Even if the words were not present, visual inspection of the symbols themselves still suggest the concepts ascribed to them in the pamphlets. The symbols do not lose their communicative capacity merely because the words do not appear on the wood burnings. "Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way." *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997). Kean clearly

intended to communicate the messages contained in the pamphlets, and there is a strong likelihood that this meaning would be understood by anyone looking at the wooden pieces. Just as the First Amendment protects Kean's distribution of written materials in exchange for voluntary donations, it also protects Kean's distribution of symbols of his written messages in exchange for voluntary donations.

The bracelets and other pieces of jewelry present a different issue because there are no symbols to link them to Kean's message. Nonetheless, their distribution in the manner chosen by Kean is still protected by the First Amendment. Critical to this conclusion is the fact that these items are distributed along with written material espousing protected speech unrelated to the "product" and the fact that monetary payment is not required; a donation is voluntary. *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983) (reciting a variety of case-specific factors to determine whether a pamphlet discussing condom use and referring to brand of condom manufactured by the "speaker" constitutes commercial or non-commercial speech). Here, the pamphlets make no reference to the jewelry and a donation is voluntary, thereby demonstrating that there is no economic interest to Kean in the distribution of the jewelry. Kean's objective is not to sell or distribute jewelry per se, but rather to communicate his message(s) and solicit/encourage donations so that he can continue his efforts. The City finds it significant that Kean suggests a donation based on the value of the item(s) being given away. Of course, this practice is not uncommon among charities. More importantly, however, is the fact that the Supreme Court has indicated that this fact is of little consequence, In *Murdock v. Pennsylvania*, 319

U.S. 105 (1943), *restricted on other grounds in Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court noted that the optional, suggested donation bore some correlation to the price for the items being distributed. 319 U.S. at 106-07 & n.2. Nonetheless, the activity was deemed protected by the First Amendment.[4]

The fact that the jewelry is distributed only in conjunction with a pamphlet is also significant. The combination makes it unnecessary to scrutinize the items separately; viewed in concert, the distribution of the jewelry is intended to increase the enticement to the passersby and, hopefully, the possibility that they might provide a donation. The fact that the jewelry, alone, does not contain a symbol or other manifestation of Kean's message does not change the fact that the accompanying request for voluntary donations is part and parcel of the protected message. *E.g.*, *Village of Schaumburg*, 440 U.S. at 632.[5]

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4. Although *Murdock* involved the distribution of religious items, the Court also said that the religious activity "has the same claim to protection as the more orthodox and conventional exercises of religion . . . to the guarantees of speech and freedom of the press." 319 U.S. at 873. Careful reading of *Murdock* reveals that the fact that the speech at issue was religious in nature was not determinative of the outcome, so the case is equally applicable in both the Free Exercise and the Free Speech contexts.

5. Soliciting financial support . . . must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic,

(Cont'd)

For these reasons, the Court concludes that Kean's speech and other activities on the sidewalks of Kansas City constitute core First Amendment activities that are fully protected against the City's efforts to outlaw them. Section 50-2 is therefore unconstitutional as applied in this context.[6]

D. Facial Attack on Section 50-2's Constitutionality

Even if Kean's message is "commercial," it is still entitled to protection under the First Amendment. "[W]hen

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(Cont'd)

> political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.

Village of Schaumburg, 444 U.S. at 632.

6. Although the City has suggested the ordinance is a valid time, place or manner restriction, the City has also contended that (1) the ordinance cannot apply to "core" First Amendment expressions, and (2) its time, place and manner justifications all rely on the premise that Kean has been engaged in purely economic, non-expressive conduct. In concluding that Kean's activities are expressive, non-commercial expressions, there is no need to discuss the City's time, place or manner arguments at this juncture. In any event, the issue is addressed in Part II.D of this Order, and what is said there would apply in this context as well.

a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (plurality opinion). "[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). However, the ordinance is not content neutral in at least two respects: first, it imposes restrictions on commercial speech that are not applicable to non-commercial speech, thereby unjustifiably preferring the former over the latter; second, it permits commercial speech that conveys some messages while outlawing commercial speech that conveys other messages. Additionally, the ordinance is not narrowly tailored to serve the City's valid governmental interests.[7]

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7. In light of these conclusions, there is no need to consider whether the City has left open ample alternative methods of communication. *City of Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410, 430 (1993) ("[T]he city's newsrack policy is neither content neutral nor . . . 'narrowly tailored.' Thus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legislative time, place, or manner restriction on protected speech.").

Appendix C

1. Content Neutrality

Without conceding that his speech is commercial in nature, Kean attacks section 50-2 by relying on the Supreme Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). His argument takes two forms: first, the ordinance is an unlawful preference for non-commercial speech over commercial speech; second, the ordinance unlawfully prefers some commercial speech over other commercial speech. Both points are valid.

At issue in *Discovery Network* was a municipal ordinance that prohibited the sale or other distribution of commercial handbills. A challenge was brought by two companies. The first company provided educational, recreational and social programs to individuals in the Cincinnati area and distributed magazines from newsracks to advertise its activities. The second company distributed a magazine containing residential property listings and other financial information. 507 U.S. at 412-13. The restriction on distribution did not apply to "newspapers," and coin-operated newsracks designed to dispense "newspapers" were not outlawed by the ordinance. For the sake of argument the Court accepted that the outlawed magazines constituted "core" commercial speech, while the permitted newspapers contained no commercial speech. Nonetheless, the Court concluded that "[n]ot only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case the distinction bears no relationship whatsoever to the particular interests that the city has asserted." 507 U.S. at 424. The same criticisms apply to section 50-2.

Appendix C

The City concedes that the ordinance permits "noncommercial" First Amendment activity; however, a fair reading of the ordinance demonstrates that it prohibits a fair amount of "commercial" First Amendment activity. It outlaws advertisements for, and offers to buy and sell, goods and services; thus, a person could distribute a handbill advocating positions on issues of the day, but could not (with a few exceptions) distribute a handbill advertising the sale of a product or service. A fundraiser can stand on a sidewalk and request donations to the Red Cross, but a street mime cannot request or accept contributions for his or her performance. Clearly, any attempt to determine whether a particular offer or solicitation violates the ordinance requires delving into the content of the message. "Please give money to the church" is a permissible message; "please give me money to show appreciation for this fine poem I have recited" is not.

The City contends that the ordinance is not invalid because it is not discriminating against a particular viewpoint or otherwise hostile to a particular message. This contention was specifically rejected by the Supreme Court:

> The city contends that its regulation of newsracks qualifies as [a time, place or manner] restriction because the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents' publications. Thus, the argument goes, the justification for the regulation is content neutral.
>
> The argument is unpersuasive because the very basis for the regulation is the difference in

> content between ordinary newspapers and commercial speech. True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, [502 U.S. 105, 117, (1991)]. Regardless of the mens rea of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers." Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."

507 U.S. at 429; *see also Whitton v. City of Gladstone*, 54 F.3d 1400, 1405 (8th Cir. 1995) ("[T]he argument that a restriction on speech is content-neutral because it is viewpoint-neutral has been repeatedly rejected by the Supreme Court.").

Further examination of the ordinance demonstrates that it not only draws distinctions between commercial and non-commercial speech, but it also draws distinctions between various commercial messages based on their content. A person can stand on a sidewalk and say "Please buy my flower," "Please buy a tamale," or "Please take this gift of a necklace," but a person cannot stand on a sidewalk

and say "Please buy this necklace." The legality of the statement depends on its content.

The ordinance's underinclusiveness has serious ramifications for its alleged content-neutrality. "While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (emphasis in original). For instance, in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court addressed an ordinance that prohibited peaceful picketing except for peaceful picketing about labor issues. In rejecting the constitutionality of the ordinance, the Court observed "[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign." 408 U.S. at 95. Similarly, the City has described permissible commercial messages in terms of their subject matter: the operative distinction is the content of the message. When government regulation distinguishes between different speech-related activities in a public forum, it must "finely tailor" the regulation, "and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).[8]

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8. *Mosley* and *Carey* observe that the First Amendment principles are intertwined with Equal Protection principles because of the distinctions that are drawn by the ordinance at issue. However, the analysis dovetails, removing the need for a separate, distinct Equal Protection inquiry. *E.g.*, *Mosley*, 408 U.S. at 94-95.

Appendix C

2. "Narrowly Tailored"

Having concluded that section 50-2 is not content neutral, the Court would consider the City's justification for these distinctions to determine whether they are narrowly tailored to those purposes — but the City has not clearly advanced its justifications for the ordinance. Hints about possible goals are presented; namely, that the ordinance "would . . . reduce the number of peddlers on the streets thereby lessening congestion, noise and freeing the sidewalk for people to walk down. Established stores would not have to compete with peddlers in terms of the stores having higher overhead costs and tax obligations, while the peddlers would have little or none." Defendant's Reply Suggestions in Support of the City's Motion for Summary Judgment at 2. The initial (and perhaps dispositive) problem is that these statements constitute *possible* rationales for section 50-2 — Defendant has not presented any indication as to the true justification for the ordinance. "[T]he 'narrowly tailored' requirement governs the degree of intrusion the government can impose on behavior that does threaten its interests to some degree. To justify any intrusion at all there must be a threshold showing that the factual situation demonstrates a real need for the government to act to protect its interest." *Association of Community Org. for Reform v. St. Louis County*, 930 F.2d 591, 595 (8th Cir. 1991); *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995). The City has not offered any indication as to why the ordinance was actually passed, nor has it suggested that additional discovery on this issue is needed. *See* Fed. R. Civ. P. 56(f). In fact, the City has filed its own Motion for Summary Judgment, indicating its belief that the record is sufficiently devoid of

factual dispute to permit a ruling. However, accepting that both goals — decreasing congestion and traffic and preserving business competition — are intended, *e.g.*, *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 554 (1996), neither will save the ordinance.

The Supreme Court's reasoning in *Discovery Network* is applicable here. The Court observed that "[t]he city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive." 507 U.S. at 425. The Court provided further explanation when it "agree[d] with the city that its desire to limit the total number of newsracks is justified by its interests in safety and esthetics. The city has not, however, limited the number of newsracks; it has limited (to zero) the number of newsracks distributing commercial publications. As we have explained, there is no justification for that particular regulation other than the city's naked assertion that commercial speech has 'low value.' . . . there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." 507 U.S. at 429-30. Similarly, the potential for purveyors of commercial speakers to block the sidewalk is no greater than the potential of purveyor's of non-commercial speakers to block the sidewalk. It makes no sense for Defendant to enact this ordinance to insure that sidewalks remain clear, given that it cannot prevent a wide variety of commercial activity that might impair access to public walkways. Neither the

record nor Defendant suggests that those who engage in commercial First Amendment activity present more of a problem for traffic than traveling florists, grocers, hucksters and others who offer to sell their wares on the public streets and sidewalks — and to solve this problem by parsing out permissible messages and impermissible messages violates the Constitution.

Supporting the Court's logic was a distinction between Cincinnati's newsrack ban and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which held that a city could impose particularized zoning regulations on adult movie theaters. The ordinance was upheld "largely because it was justified not by an interest in suppressing adult films, but by the city's concern for the 'secondary effects' of such theaters on the surrounding neighborhoods." *Discovery Network*, 507 U.S. at 430. Thus, a city cannot achieve its legitimate goals by drawing distinctions between permissible and impermissible First Amendment activity absent a relationship between the particular activity in question and the goals. No special connection or other justification for "disfavoring" commercial speech in order to solve a harm equally attributable to commercial and non-commercial speech is present, so congestion and traffic concerns do not validate section 50-2. As a traffic control ordinance, section 50-2 is woefully inadequate; if someone engaging in non-commercial speech blocks passage on the sidewalk, this ordinance will not provide a solution to the problem. Moreover, it sweeps too broadly for the stated purpose because it eliminates commercial speech that does not pose traffic problems. As explained by the First Circuit in discussing *Discovery Network*, "though the city's underlying

purpose in enacting the ordinance was proper, the differential treatment of speakers had no relationship to that underlying purpose. Thus, [the case] establishes a much narrower proposition: that, even when a municipality passes an ordinance aimed solely at the secondary effects of protected speech (rather than at speech per se), the ordinance may nevertheless be deemed content-based if the municipality differentiates between speakers for reasons unrelated to the legitimate interests that prompted the regulation." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 738 (1st Cir.), *cert. denied*, 515 U.S. 1103 (1995) (footnote omitted)).

The ordinance's exceptions differentiate this case from *One World*, which was confronted with an ordinance that banned the sale of all "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services . . . upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki." 76 F.3d at 1011 (quoting ordinance). Although this Court has reservations about the constitutionality of a blanket ban on all commercial speech, the ordinance did not permit some commercial speech and outlaw other commercial speech based on nothing more than content. This distinction was later recognized by the Ninth Circuit (the court that decided *One World*) when it decided *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365 (9th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3509 (Mar. 30, 1998) (No. 97-1228), and observed that in *One World* "the restriction did not discriminate against certain types of speech depending on the speaker." 121 F.3d at 1371.

In this regard, the present case is much different from the one presented in *Heffron v. International Society for*

Krishna Consciousness, Inc., 452 U.S 640 (1981), a case upon which the City relies. There, the Court was confronted with a rule requiring that the sale, distribution and exhibition of promotional materials be confined to fixed points in the fairgrounds of the Minnesota State Fair. In contrast with the present case, the rule did not permit certain messages to be conveyed throughout the fairgrounds while confining other messages to their speakers' booths. "Although the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views with fair patrons in face-to-face discussions, it does require that any exhibitor conduct its sales, distribution, and fund solicitation operations from a booth . . . . Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth. The Rule applies alike to nonprofit, charitable, and commercial enterprises." 452 U.S. at 643-44 (footnotes omitted).[9]

The ordinance is similarly suspect as an attempt to "protect" business. Using Kean's actions as an example, the City has not proffered any special reason for protecting jewelry stores from street vendors' advertisements and offers to sell, yet permitting restaurants and flower shops to compete with such efforts. The ordinance is not sufficiently

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9. This also differentiates *National Amusements*; the ordinance at issue in that case provided that "No holder of an entertainment license for theatrical exhibition, public show, public amusement, concert, dance or exhibition . . . shall conduct business between the hours of 12 midnight and 6:00 a.m." 43 F.3d at 734. The ordinance was deemed both content neutral and a limited response to the secondary effects of licensed (as opposed to unlicenced) entertainment.

tailored to accomplish this purpose. "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place." *Gilleo*, 512 U.S. at 52 (citing *Discovery Network*, 507 U.S. at 418-28). The wide range of commercial messages permitted by the ordinance severely undercuts the viability of the City's asserted goal of protecting businesses in fixed locations.

This is not to say that Defendant is without means to deal with these issues should the need arise. If the City wished to pass an ordinance prohibiting people from blocking the right of way on public sidewalks, the ordinance would be content neutral, satisfy the interest at hand, and not run afoul of the First Amendment.[10] If the City wished to pass an ordinance that prohibits wagons, carts and other modes of engaging in commercial activity, it could do so; again, such an ordinance would be a content neutral regulation of the manner in which speech is delivered.[11] If the need exists,

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10. Lest Defendant seize upon this as a way to rid the sidewalks of Kean's presence, it must be remembered that the parties have agreed that Kean does not block travel along the sidewalks. Accordingly, any renewed effort to discourage Kean predicated on such grounds would be viewed with some suspicion.

11. Although it may still be an open question, it appears the City could even prohibit all in-person requests for immediate payment of money. *E.g.*, *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2721 (1992) (Kennedy, J., concurring); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954-55 (D.C. Cir. 1995).

similar content neutral possibilities exist with respect to the City's interest in protecting businesses.

E. CONCLUSION

For the foregoing reasons,

1. Plaintiff Jill Harmon is dismissed without prejudice,

2. Section 50-2 of the City Code of Kansas City, Missouri is declared unconstitutional, and Defendant is enjoined from enforcing it, and

3. A hearing will be held on May 7, 1998 at 8:30 a.m., at which time Plaintiff John Kean will be permitted to present evidence regarding his damages.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 4/2/98

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED JUNE 16, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 97-0411-CV-W-3

JILL HARMON and JOHN KEAN,

Plaintiffs,

vs.

CITY OF KANSAS CITY, MO.,

Defendant.

ORDER

Plaintiffs have filed this suit seeking injunctive and declaratory relief in an attempt to have Section 50-2 of the City Code of Kansas City declared unconstitutional. Plaintiff Harmon also seeks monetary damages arising from her arrest for violating this provision. Pending is Defendant's Motion to Dismiss or Stay Proceedings.

Given the procedural posture, the Court must accept the allegations in the Complaint as true. Plaintiffs desire to distribute leaflets and pamphlets that deal with "personal, social and political issues." Their attempts have been

thwarted by police officers who rely, in part,[1] on Section 50.2 which provides (with some exceptions) that no person may sell or offer for sell "any article, thing or personal service, except newspapers and magazines, in or upon any street, sidewalk, alley, public way . . . ." On July 19, 1996, Harmon was arrested for violating this provision.[2]

Defendant seeks dismissal or a stay based primarily on *Younger v. Harris*, 401 U.S. 37 (1971), which generally prohibits (with exceptions not relevant here) federal courts from enjoining state criminal proceedings. *Younger* also prohibits federal courts from granting declaratory (or other equitable) relief that would serve to enjoin state criminal proceedings. It is obvious that *Younger* applies because Harmon's state criminal proceedings have not concluded.

However, Kean was neither arrested nor charged. Regardless of his relationship to Harmon, Kean's right to proceed is not affected by Harmon's ongoing criminal proceedings. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975); *Womens Services, P.C. v. Douglas*, 653 F.2d 355, 358-59 (8th Cir. 1981). Accordingly, *Younger* provides no basis for dismissing or staying Harmon's efforts in this Court.

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1. Plaintiffs' efforts in the Westport area of Kansas City were, at one time, prohibited by Section 50.8(c), which is the subject of a separate lawsuit before the Court.

2. In its Motion, Defendant contends that Harmon was arrested for selling a piece of jewelry and not a pamphlet. At this stage of the proceedings, it is not clear whether she would have been arrested for selling leaflets or pamphlets; in any event, the Court must accept Plaintiff's characterization for purposes of this motion.

Appendix D

Defendant also contends that Kean's claims should be dismissed because "he has not alleged that he has been either arrested or charged with violating [section] 50-2." The assumption underlying this contentions proves too much and would make it impossible for Kean to proceed: Defendant contends he must be arrested or charged to have a claim, but if he is arrested or charged *Younger* will bar suit. Keeping in mind that Kean is proceeding *pro se*, the Court finds that his Complaint alleges sufficient threat and fear of prosecution to entitle him to proceed. *See Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974); *Postscript Enter., Inc. v. Westfall*, 771 F.2d 1132, 1135-36 (8th Cir. 1985). Because Kean's case must continue, the Court believes it prudent to simply stay proceedings in this Court as they relate to Harmon.

Accordingly, it is ordered that:

1. Proceedings in this case are stayed only as they relate to Harmon; proceedings may continue as they relate to Kean;

2. Defendant is to file an Answer to the Complaint within twenty days of this Order; and

3. Defendant shall respond to the Motion for Injunctive Relief insofar as it seeks relief with respect to Kean and advise the Court as to the status of Harmon's criminal proceedings within twenty days of this Order; the Court will set a date for a hearing on the preliminary injunction at a later time.

Appendix D

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 6/16/97

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3630WMKC

Jill Harmon, John Kean,

Appellees,

v.

City of Kansas City, MO,

Appellant.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 24, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit